



NATURAL RESOURCES DEFENSE COUNCIL

December 20, 2007

Via electronic mail and U.S. mail

Executive Officer and Members of the Board
Central Coast Regional Water Quality Control Board
895 Aerovista Place, Suite 101
San Luis Obispo, CA 93401

Re: Comments on City of Salinas December 3, 2007 Comment Letter

Dear Mr. Briggs and Members of the Board:

On behalf of the Natural Resources Defense Council and its more than 100,000 members in California, we submit these comments in response to the City of Salinas's comment letter (dated December 3, 2007), which urges approval of the City's Stormwater Management Plan ("SWMP"). Our comments focus on the legal inadequacy of Salinas's response to the Regional Board's required revisions and its assertion that the SWMP is legally sufficient for Regional Board approval. The City is incorrect in claiming that its SWMP will meet the Clean Water Act's MEP standard when certain changes are made.

We wish to underscore that while Salinas largely accepts Regional Board staff comments in many areas of the SWMP, it rejects staff's comments regarding the inadequacy of the new development and redevelopment program. In particular, Salinas rejects the view that further action is necessary to implement low impact development ("LID") principles, as required by the Permit, and it rejects the view that these changes are legally mandated by the Clean Water Act. (Salinas December 3, 2007 Comment Letter at 4 [hereinafter "Salinas Comment Letter"].) Salinas is wrong. In fact, not only are Regional Board staff's comments requiring further changes to implement LID through the SWMP well-taken, they do not go far enough toward requiring that the necessary specification of LID standards occur quickly, both prior to Regional Board approval of the SWMP and after public review and comment.

The City's Comment Letter Improperly Asserts that No Additional Action is Required to Ensure that Development-Related SWMP Provisions Are Adequate.

The City's position, as described in its December 3, 2007 letter, is in conflict with the following clear and applicable legal requirements:

- A. Under the Permit, Salinas must require BMPs that reduce pollutants in stormwater discharges to the MEP standard, and these BMPs must be**

described in the SWMP. (40 C.F.R. § 122.26(d)(2)(iv); Order No. R3-2004-0135 at A(3), D(2).) *The current version of the SWMP fails to describe adequate BMPs and to provide enforceable requirements that will allow Salinas to meet the MEP standard.*

Despite the Permit's clear mandate, the SWMP contains no description of which BMPs are required. What it contains, instead, is a list of general design concepts that are vaguely worded and not necessarily required at all. For example, in the section on BMPs that increase rainfall infiltration, the SWMP says: "Where soils percolate freely, consider infiltration designs." (SWMP at 4-24.) This is entirely insufficient to meet the MEP standard, and it fails to provide the detail necessary for meaningful review of the SWMP. Under *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003), "Stormwater management programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable." (*Id.* at 856.) Contrary to the city's claim that the "SWMP will meet the MEP standard with incorporation of the required revisions," those revisions do not rectify the lack of specificity, as further described below. (Salinas Comment Letter at 1.)

The SWMP also contains an unacceptable loophole for BMP implementation: "where certain prescriptive BMPs prove impracticable, other BMPs that similarly meet the Municipal Permit standard [MEP] ... must be substituted.... [G]oals, objectives and policies from the City's General Plan that protect water resources will also be considered BMPs." (SWMP at 4-23.) Additionally, when describing "site planning and development BMPs," the SWMP sets forth indefinite decision-making criteria and then cites a non-existent source of authority: "Selection of site design BMPs will be project, site and performance driven, and consistent with the Stormwater Development Standards document." (SWMP at 4-23.) The problem is, the City has yet to craft its "Stormwater Development Standards document" (discussed at greater length below), so it is impossible to analyze whether any requirements that could potentially be included in that document will enable Salinas to meet the MEP standard. The Regional Board will, therefore, not be able to engage in meaningful review of the SWMP for compliance with the Clean Water Act. (See *Environmental Defense Center*, 344 F.3d at 856.)

While the failure to prepare BMP implementation standards that meet the terms of the Permit is unacceptable, so too is the City's refusal to commit to making readily available the countless documents which it claims support and guide its program in other respects. The City states in its December 3 comments that "[w]here possible and practicable, all documents referenced in the SWMP that can be posted to the City's website will be.... Those documents which may not be posted due to the sensitive, proprietary or otherwise confidential content will not be posted to the City's website."

(Salinas Comment Letter at 2.) It is ironic, to say the least, that the City, on the one hand, asserts that many documents other than the SWMP are relevant to the plan's implementation and that the City is doing everything possible to involve the public in the SWMP process, while, on the other hand, the City refuses to make a number of the referenced documents readily accessible to the public. Curtailing public participation in this way is impermissible under the Clean Water Act, which declares, "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States." (*Waterkeeper Alliance v. EPA*, 399 F.3d 486, 503 (2nd Cir. 2005) (citing 33 U.S.C. § 1251(e)).)

B. The Permit requires Salinas to adopt Development Standards that implement LID BMPs, and these BMPs should, in turn, enable the City to meet the MEP standard. (Order No. R3-2004-0135, Attachment 4, at 6-7.) The City has not yet adopted Development Standards and LID requirements, and the SWMP cannot be meaningfully evaluated without their adoption.

The City's claim that the SWMP will meet the MEP standard is further belied by the fact that the SWMP does not contain, but continually refers to, Development Standards, which are required by the Permit. The Permit mandates that Salinas submit for public review and Executive Officer approval, within one year of the Permit's adoption, a Development Standards Plan ("DSP") "that describes measures to reduce pollutant discharges to the MEP..." (Order No. R3-2004-0135, Attachment 4, at 6.) The final version of the DSP was not approved until July 2007, more than a year behind schedule. While the DSP contains information on LID designs, it does not establish any enforceable standards for development projects in Salinas. Those enforceable requirements are, instead, created by legally binding "Development Standards."¹ Specifically, the Permit mandates that all new development and significant redevelopment projects must be "reviewed and conditioned for compliance with the Development Standards." (Order No. R3-2004-0135, Attachment 4, at 7.) Within the scheme of the Permit, these Development Standards are critical because they constitute the principal source of authority for imposing conditions on development projects such that the City's stormwater discharges meet the MEP standard.

In keeping with the Permit, the SWMP frequently references the forthcoming Development Standards document as the source of Salinas's enforceable LID requirements: "Where the [DSP] is a guidance document for the City, the Stormwater Development Standards will be a specification and guidance document for the engineers and designers working on plans for new development." (SWMP at 4-12.) However,

¹ Compounding the problem, the City fails even to explain what form the legally binding Development Standards will take (e.g., ordinance, resolution, etc.).

because the City has not yet drafted these standards, neither the Regional Board nor the public has any idea whether the SWMP will enable the City to meet the Clean Water Act's MEP standard. This piecemeal approach is impermissible under federal regulations and the Clean Water Act. (See *Environmental Defense Center*, 344 F.3d at 855, fn. 32 ("Absent review on the front end of permitting, the general permitting regulatory program loses meaning even as a procedural exercise.")) If the Development Standards turn out to be legally inadequate, then the SWMP is also legally inadequate.

The City's position, as expressed in its comment letter, is all the more difficult to comprehend because Salinas is years behind meeting the Permit's schedule for creating a new development program. Under *Environmental Defense Center* and *Waterkeeper Alliance*, issuance of the Permit without the accompanying SWMP in the first place was flatly unlawful. To compound that violation now by approving the SWMP without the detail necessary to enable meaningful review by the Regional Board and public simply adds insult to injury and would make a mockery of the Clean Water Act's requirements, as authoritatively interpreted by two federal circuit courts of appeal. As the case law clearly establishes, "stormwater management programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable." (*Environmental Defense Center*, 344 F.3d at 856.) Currently, Salinas has not provided sufficient information on how it will implement and require LID for the Regional Board to undertake meaningful review of the SWMP.

1. The Permit requires Salinas to ensure compliance with State Board Order WQ 2000-11.

In addition, Development Standards adopted by the City must be consistent with state law and State Water Resources Control Board precedent, particularly the requirements of State Board Order WQ 2000-11. (Order No. R3-2004-0135, Attachment 4, at 7.) Of course, without Development Standards, the Regional Board cannot undertake the necessary comparative evaluation, and the DSP itself fails to uphold the Permit's conditions because it does not describe how "proposed modifications to the Development Standards ... [will be] consistent with the requirements of State Board Order WQ 2000-11..." (Order No. R3-2004-0135, Attachment 4, at 7.)

2. The Permit requires Salinas to implement LID.

Furthermore, contrary to the City's claim that its SWMP adequately complies with development-related aspects of the Permit, the SWMP remains legally insufficient because it still fails to explain what LID-related requirements exist or will exist. The

Regional Board highlighted this in a letter sent to Salinas two years ago: "The City must ... incorporate LID methodology into new and redevelopment ordinances and design standards unless the City can demonstrate that conventional BMPs are equally effective, or that conventional BMPs would result in a substantial cost savings while still adequately protecting water quality.... The City must provide convincing arguments if the City fails to incorporate low impact development principles." (Letter from Roger W. Briggs, Executive Officer, Central Coast Regional Water Quality Control Board, to City of Salinas (December 23, 2005).) In this situation, even if Salinas makes all of the changes that it pledged to make in its comment letter, the SWMP will remain inadequate because of its failure to incorporate effective, clear, and enforceable LID requirements.

- C. Pursuant to the Regional Board's Notice of Violation and required revisions to the SWMP, Salinas was obligated to revise its municipal ordinances and policies in accordance with Kennedy/Jenks's Final Technical Memorandum No. 1 ("Tech Memo No. 1"). (Notice of Violation for City of Salinas, Order No. R3-2004-0135 (September 1, 2006) at 6 [hereinafter "Notice of Violation"].) *The City's response to Tech Memo No. 1 was inadequate and did not properly address the recommendations included within Tech Memo No. 1.***

Tech Memo No. 1 provided a summary of actions that Salinas should take in order to implement LID BMPs through the City's ordinances and guidance documents. The Regional Board's Notice of Violation stated that "the City must incorporate, formally address, or provide detailed plans on how all comments provided in the memorandum will be addressed, or provide justification acceptable to the Executive Officer for excluding or modifying any suggested revisions." (Notice of Violation at 6, emphasis in original.) The City's response to Tech Memo No. 1 (attached to the City's recent comment letter) was characteristically vague and noncommittal. The City's reliance on this response as a basis to refuse to specify how Salinas will implement LID is unpersuasive. (Salinas Comment Letter at 4.)

At the beginning of its response to Tech Memo No. 1, the City attacked the document as unhelpful: "These suggested modifications ... do not resolve conflicts between City codes, documents, and standards (on the one hand), and the NPDES program (on the other). Nor will the recommended modifications necessarily provide foreseeable water quality runoff improvements in the City. Rather, the majority of recommended modifications either duplicates existing [City requirements] ... or simply adds editorial comments regarding an existing requirement." (Letter from Robert C. Russell, Deputy City Manager and City Engineer, City of Salinas, to Michael Thomas, Acting Executive Officer, Central Coast Regional Water Quality Control Board (Jan. 30, 2007).) However, the City wholly failed to substantiate this claim and did not engage in a comprehensive justification of its position that would allow the Regional

Board's Executive Officer to accept the City's response to Tech Memo No. 1. Moreover, Salinas has failed to indicate precisely what standards do exist (or will exist) that will enable Salinas to meet the MEP standard and the other requirements of the Permit.

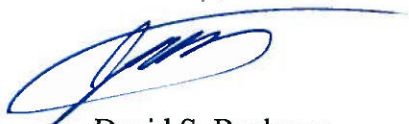
Regional Board staff is correct in asking the City, through the use of Tech Memo No. 1 or other sources, to explain clearly in the SWMP what specific LID standards apply to development projects within the City. This is necessary to evaluate the consistency of the SWMP with the MEP standard, including State Board Order WQ 2000-11.

D. The Permit requires the City to submit a revised SWMP to the Regional Board within 180 days of Permit approval. (Order No. R3-2004-0135 at D(2)(c).) *The City is more than two years late in submitting its revised SWMP.*

The 180-day period for submitting the City's revised SWMP ended *more than two years ago*, yet still nothing approximating an acceptable SWMP has been submitted to the Regional Board. This is a clear violation of the Permit and, therefore, of the Clean Water Act. Even if the City had submitted an adequate SWMP this year, it would still have been in flagrant violation of its Clean Water Act responsibilities. It is legally imperative that Salinas submit a properly revised SWMP now.

In sum, the City of Salinas's recent comment letter does not demonstrate that the City is now—or will later be—capable of meeting the Clean Water Act's MEP standard. To the contrary, the City's claims that its SWMP is legally adequate are belied by numerous gaps in the City's stormwater mitigation program. At this point, the Regional Board cannot approve Salinas's SWMP because it is not in compliance with the City's MS4 Permit and the various laws governing municipal stormwater dischargers. The City's recent comment letter highlights this problem, as well as the overall inadequacy of Salinas's conduct during the nearly three years since the Permit was issued.

Sincerely,

A handwritten signature in blue ink, appearing to read "David S. Beckman", with a long, sweeping horizontal line extending to the right.

David S. Beckman
Bart Lounsbury
Natural Resources Defense Council